Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers	)	CC Docket No. 02-39

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

The National Association of State Utility Consumer Advocates ("NASUCA")[1] hereby submits these comments in response to the *Notice of Inquiry* ("*Notice*") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.[2] The *Notice* focuses on the equal access and nondiscrimination obligations of incumbent local exchange carriers ("ILECs"), in particular the Bell Operating Companies ("BOCs"), toward interexchange carriers and information service providers.[3] These obligations are found in 47 U.S.C. § 251(g).

The Commission expresses two specific goals for this inquiry: "to facilitate an environment that will be conducive to competition, deregulation and innovation"; and "to establish a modern equal access and nondiscrimination regulatory regime that will benefit

---

[1] NASUCA is an association of 42 consumer advocates in 40 states and the District of Columbia. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

[2] FCC 02-57, adopted February 19, 2002. A synopsis of the *Notice* was published in the Federal Register on March 11, 2002. See 67 Fed. Reg. 10919.

[3] *Notice*, ¶ 1.

consumers."[4] In that regard, NASUCA recommends that the Commission do nothing in the near future. It would be significantly premature for the Commission to relax equal access and nondiscrimination obligations of ILECs at this time, as suggested throughout the *Notice*.

In issuing its *Notice* the Commission is operating on a false assumption: that ILECs, in particular the BOCs, are no longer monopolies or even the dominant local exchange carriers in the United States. Indeed, the *Notice* speaks of BOC monopoly status as if it were a relic from a bygone era:

> The MFJ, and the court cases that interpreted it, contain equal access and nondiscrimination obligations that apply to BOCs today, but reflect concerns that existed at a time when they were the monopoly providers of local services and were prohibited from offering interexchange services.[5]

In fact, little has changed since the passage of the Telecommunications Act of 1996,[6] which codified the equal access and nondiscrimination obligations contained in the Modification of Final Judgment ("MFJ") in the *AT&T* case.[7] The Commission's latest report on local competition clearly shows that ILECs, including BOCs, still have a monopoly in the local exchange market.[8] Among the findings in the Report:

- Competitive local exchange carriers ("CLECs") control 9% of end-user switched access lines; thus ILECs still control 91% of end-user switched access lines nationwide.[9]

---

[4] *Id.*, ¶ 2.

[5] *Id.*, ¶ 3; see also *id.*, ¶ 13.

[6] Pub. L. No. 104-104, 110 Stat. 56.

[7] *United States v. American Tel. and Tel.*, 552 F. Supp. 131 (D.D.C. 1982); see *Notice*, ¶ 3; 47 U.S.C. § 251(g).

[8] "Local Telephone Competition: Status as of June 30, 2001," Industry Analysis Division, Common Carrier Bureau (February 2002) ("Report"). Except for some revenue data, the Report does not differentiate between BOCs and non-BOC ILECs.

[9] *Id.*, Table 1.

- Two-thirds of the CLEC total involves the use of acquired lines, either through resale or unbundled network elements ("UNEs").[10] Thus, only about 3% of end-user switched access lines are provided over non-ILEC facilities, and therefore ILECs own 97% of end-user switched access lines.

- ILECs control 94.5% of residential and small business end-user switched access lines.[11]

- ILECs control at least 86% of end-user switched access lines in 49 states, the District of Columbia, Puerto Rico and the Virgin Islands.[12]

- ILECs account for 91.1% of local service revenues.[13]

By any reasonable definition, ILECs are still monopolists. The findings of the Report clearly belie the Commission's assumption.

The Commission should not equate a BOC's meeting the Section 271 competitive checklist with the existence of meaningful competition in the BOC's territory.[14] To do so would be a disservice to residential consumers, the vast majority of whom continue to have only one choice for local service – the ILEC.[15] Meeting the checklist means only that the BOC has *opened* its market to competition. Even so, BOCs have met the checklist in only eleven states.[16] The existence of meaningful competition cannot be assumed.

---

[10] *Id.*, Table 3.

[11] *Id.*, Table 2. Combined, ILECs and CLECs control 142,110,700 switched access lines, while CLECs alone control only 7,793,071.

[12] See *id*., Table 6.

[13] *Id.*, Table 14. The table does not distinguish revenues of competitors of BOCs and non-BOC ILECs. Nevertheless, if all competitors' revenues ($10,664,000,000) were derived from competition to BOCs, BOCs would still have 89.8% of the combined BOC and competitors' revenues ($104,744,000,000).

[14] 47 U.S.C. § 272.

[15] In this regard, the Report contains information that lends itself to misinterpretation. Table 12 shows that 90.5% of the nation's households are in ZIP codes that have at least one CLEC available. However, the Report does not indicate whether the CLECs surveyed serve residential customers. A more relevant category would be the percentage of households in ZIP codes with CLECs that serve residential customers.

[16] See http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications/. Thus, BOCs' local markets have not been found to be *open* to competition in 39 states.

The Commission seeks comment on whether the current equal access and nondiscrimination requirements found in Section 251(g) should apply to those BOCs that have obtained long distance authority through Section 271.[17] The Commission notes that the requirements are based on the concerns expressed in the MFJ that the BOCs would favor their former Bell System affiliate, AT&T.[18] The Commission seeks comment on the continuing need for the requirements "[i]n an era when there are no longer any dominant interexchange carriers…."[19]

However, the Commission is mistaken in its belief that the obligations contained in Section 251(g) were based only on a desire to reign in a dominant interexchange carrier. In codifying Section 251(g), Congress would not have been concerned with AT&T's dominance in the market. AT&T was reclassified as a non-dominant carrier in 1995.[20] Thus, there were no dominant interexchange carriers when the Act was passed in 1996.

Rather than focusing on the dominance of an interexchange carrier, Section 251(g) addresses the relationship between ILECs and interexchange carriers. Section 251(g) keeps in place "restrictions and obligations … that apply to such [local exchange] carrier on the date immediately preceding" enactment of the Act. For BOCs, that included the equal access and nondiscrimination provisions of the MFJ. Those obligations were in place not simply because of AT&T's dominance in the interexchange market, but because of the fear that BOCs would use their local exchange monopoly

---

[17] *Notice*, ¶ 12.

[18] *Id.*, ¶ 11.

[19] *Id.*

[20] See *In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, *Order*, FCC 95-427, adopted October 12, 1995.

position to favor their former sister Bell company, to the detriment of the nascent long distance market.[21] In other words, there was a concern that BOCs would use their local exchange monopoly to influence the long distance market.

Similar concerns are raised by BOCs' entry into the long distance market through the Section 271 process. After the MFJ, BOCs *might* have had an incentive to discriminate in favor of their former affiliate, AT&T. With Section 271 approval, BOCs *would* have an incentive to discriminate in favor of their own affiliated long distance companies.

The harm to the market could be staggering. For example, even with equal access and nondiscrimination obligations, Verizon reached one million long distance customers in New York within seven months after receiving Section 271 approval to provide long distance service in that state.[22] One million customers represents 7.2% of the 13,827,426 end-user switched access lines in New York.[23] Thus, even with the obligations, Verizon grabbed about one percent of the New York market per month during its first seven months of offering in-region long distance. It is clear that without the obligations Verizon would be able to use its dominance in the New York local exchange market to create a dominant – or even monopoly – affiliate in the New York long distance market.

The New York experience points out the need for continued equal access and nondiscrimination requirements. Section 251(g) prevents BOCs from turning their own

---

[21] See *AT&T*, *supra* note 7, at 142.

[22] See "Verizon Wins One Million New York Long Distance Customers; Hits Target Five Months Earlier Than Expected," Verizon Press Release, August 3, 2000, available at http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=41528 (accessed April 29, 2002.)

[23] See Report, Table 6.

long distance affiliates into dominant carriers. Retention of the obligations furthers Congress's intent in enacting Section 251(g).

Moreover, the equal access and nondiscrimination obligations have not hindered BOCs from competing in the long distance market. Overall, Verizon now has 8.2 million long distance customers, having added 800,000 customers in the first quarter of 2002 alone.[24] Similarly, in the first quarter of 2002 SBC added 451,000 long distance customers in the six states in which it is authorized to provide long distance service.[25] SBC now has 5.3 million long distance customers – an increase of 1.7 million in the last twelve months.[26] The Commission should keep the obligations intact.

Equal access and nondiscrimination obligations on non-BOC ILECs are also important. While the BOCs may have an incentive in Section 271 to open their markets, other ILECs have no such incentive; they already may provide long distance service, and many of them do. Moreover, because their local exchange markets may be unattractive to CLECs, competition to non-BOC ILECs – especially for residential customers – has been even slower to develop. Customers of these companies should not be faced with only one provider of local service – the ILEC – and only one viable interexchange provider – the ILEC's. The Commission should retain existing equal access and nondiscrimination obligations on non-BOC ILECs.

---

[24] See "Verizon Reports Solid First-Quarter Adjusted EPS Of 72 Cents in Challenging Economic Environment -- 2002 Outlook Updated," Verizon Press Release, April 23, 2002, available at http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=74354 (accessed April 30, 2002).

[25] See "SBC First-Quarter Earnings of $0.51 Per Diluted Share at Top End of Target Range Provided by Company In January," SBC Press Release, April 18, 2002, available at http://www.sbc.com/press_room/1,5932,31,00.html?query=20020418-1 (accessed April 30, 2002).

[26] *Id*.

CONCLUSION

The Commission's inquiry into the removal of equal access and nondiscrimination requirements on ILECs is significantly premature. Local exchange competition, especially for residential service, has barely taken root. Thus, in most cases consumers have no alternative but the ILEC to connect with the interexchange carrier of their choice. The equal access and nondiscrimination requirements are the primary reason that long distance competition has flourished since the breakup of the Bell System in 1984. To eliminate the requirements now would begin a return to the competitive Ice Age that was the pre-divestiture long distance market. The Commission should not take such an anti-consumer action. NASUCA urges the Commission to retain the equal access and nondiscrimination requirements of Section 251(g).

Respectfully submitted,

ROBERT S. TONGREN
CONSUMERS' COUNSEL

/S/ Terry L. Etter

Terry L. Etter
David C. Bergmann
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
(614) 466-8574
FAX (614) 466-9475
etter@occ.state.oh.us

NASUCA
8300 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
FAX (301) 589-6380

Michael J. Travieso
Maryland People's Counsel
Chair, NASUCA Telecommunications Committee
On Behalf of NASUCA
Suite 2102
6 St. Paul St.
Baltimore, MD 21202

May 10, 2002